

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of)
Commission's Equal)
Employment Opportunity Rules)

MM Docket No. 94-34

To: The Commission

**COMMENTS OF THE CURATORS
OF THE UNIVERSITY OF MISSOURI**

The Curators of the University of Missouri ("the Curators"), the licensee of commercial television station KOMU-TV, Channel 8, Columbia, Missouri and non-commercial educational FM broadcast stations KBIA(FM), Columbia, Missouri, KUMR(FM), Rolla, Missouri, KMNR(FM), Rolla, Missouri, KWMU(FM), St. Louis, Missouri, and KCUR-FM, Kansas City, Missouri, hereby submit its Comments concerning the Commission's Notice of Inquiry In the Matter of Implementation of Commission's Equal Employment Opportunity Rules, released April 21, 1994 (the "Notice of Inquiry").

1. In its Notice of Inquiry, the Commission seeks comment on "the effectiveness of the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity and promotion opportunity in the cable and broadcast industries." It further seeks comment regarding the unique problems of small market broadcasters in attracting and maintaining minority employees. The Curators welcome the

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opportunity to address certain problem areas posed by the current implementation of Commission rules.

2. Overall, the Commission has established a complex and detailed process by which all licensees must demonstrate compliance with the EEO guidelines and hiring criteria. Moreover, the Commission has established severe financial sanctions for licensees that fall short of the new standards. These Comments address the unique circumstances of educational institutions in terms of EEO requirements and also seek a more appropriate Commission approach toward EEO in small markets.

I. THE FCC MUST CONSIDER THE DISTINCT HIRING SITUATION OF PUBLIC INSTITUTIONS

A. PUBLIC INSTITUTIONS MUST MEET PREVIOUSLY DEFINED EEO GUIDELINES

3. The Curators presently comply with the employment regulations from the Office of Federal Contract Compliance (OFCCP). The OFCCP is responsible for enforcing the EEO requirements for those employers, like the University of Missouri, who are federal contractors. Significantly, the OFCCP regulations provide a more accurate methodology for EEO recruitment and hiring programs for public universities than the new Commission guidelines. The imposition of a separate set of EEO rules from the federal government, via the Federal Communications Commission, is unwieldy and imposes substantial burdens on licensees who are public institutions. That burden is described by the African-American Assistant Vice Chancellor for Human Resource Services at the University of Missouri, Karen

Touzeau, in a statement attached hereto as Exhibit A. As Vice Chancellor, Ms. Touzeau is responsible for ensuring that her department gathers all the information necessary to meet the various federal employment guidelines.

4. The OFCCP methodology requires a detailed analysis of civilian labor force statistics which reveal the number of women and minorities with particular skills for common jobs within a "job family." This analysis is more appropriate than a pure workforce statistic because it represents the number of persons in a particular metropolitan area who have the skills to perform the jobs for which the licensee has vacancies. The OFCCP thus bases its EEO requirements on the number of women and minorities with the skills to perform the available job.

5. In contrast, the Commission's EEO guidelines do not and cannot reflect the actual availability of women and minorities with requisite job skills and are therefore particularly onerous. For example, in Boone County, Missouri where two of the Curators' stations are located, 48.6% of the workforce is female and 9.8% is minority. However, of the civilian labor force with the skills necessary to perform the tasks required of an engineer, only 19.1% are women and 6.4% are minorities. To reach parity in Boone County under the Commission's standards, a licensee would have to have greater than twice the percentage of women engineers than the total percentage in the metropolitan area. This flaw in the Commission's statistics is particularly unfair in light of

the severe monetary sanctions that can be imposed upon licensees who are unable to meet the Commission's guidelines.

6. Because the percentage of women and minorities actually available for a particular job opening might be less than the general civilian labor force data indicates, the Commission should focus instead upon the availability of women and minorities having requisite skills in the relevant area, like the OFCCP does. To recruit from among those without the requisite skills does not further any EEO goal and wastes the resources of the licensee and the Commission. In small markets, meeting the Commission's current guideline of interviewing a female or minority applicant for at least 66% of all full-time job openings may well be an impossibility because the actual availability of potential employees with the requisite skills can be negligible.

7. From a procedural standpoint, the Commission's new EEO guidelines are also problematic. Under the new rules, some licensees will be burdened with two sets of EEO regulations utilizing different record-keeping mechanisms and different compliance standards from two different federal agencies. The possibility for confusion pales in comparison to the volumes of record-keeping, statistical analyses, and other paperwork that will be required. The Commission should consider bringing its guidelines in line with the previously tested OFCCP regulations. At the very least, Commission licensees that are also federal contractors should be exempt from Commission requirements to the extent that they meet OFCCP EEO guidelines.

B. ACADEMIC INSTITUTIONS MUST BALANCE COMPETING GOALS IN INSTITUTIONAL HIRING

8. Unlike more traditional broadcast stations, those licensed to educational institutions focus on teaching and learning as well as operating the station. For example, every member of the full-time staff at KOMU-TV is involved in the educational process of training the many student interns at the station. Some staff members have academic appointments in addition to their work at the station, and many of its employees are teaching assistants and graduate teaching assistants. The television station has no control over the acceptance of female or minority graduate students. For insurance purposes all of these individuals are placed on the KOMU-TV payroll as part-time employees, and therefore create its employment recruitment and hiring statistics.

9. To fulfill its purpose as a teaching facility, KOMU-TV has between 40 and 60 student interns each semester. These interns are not selected from the population at large, but are University of Missouri students who enrolled in particular University courses relating to television. KOMU-TV also hires two or three full-time employees each year from the ranks of the student interns to supervise the incoming student interns. KOMU-TV selects the most qualified interns from the current pool for these positions, but, again, has no control over the female and minority content of the pool.

10. Because of its academic connection, KOMU-TV does not have many "job openings" for which it can recruit from the

general population and create a "pool" of applicants from which to hire. Moreover, the salaries for the television and radio stations are set by the Curators of the University and are not competitive with other broadcast job opportunities. Individuals attracted to positions at the University's stations frequently possess academic backgrounds and desire employment in an academic setting. The pool of qualified applicants is thus more narrow than that reflected by the FCC population statistics.

11. As both Commission licensees and the governing body of a public institution, the Curators are in a situation quite different than other Commission licensees. Not only must the Curators meet previously established hiring guidelines, but it faces hiring obstacles related to its academic requirements and its financial restrictions. The Curators are not in a position to authorize the employment of a number of individuals from the general population who have no experience, background or interest in teaching or working in an academic environment. Accordingly, public institutions should be exempted from the Commission's new recruitment and hiring requirements.

II. SMALL MARKET HIRING REALITIES MANDATE DIFFERENT STANDARDS

12. The Curators recognize and appreciate the need for an EEO policy that is consistent and fair to all licensees. Small market licensees, however, do not operate under the same environment as their Top 100 counterparts when it comes to the availability and employment of women and minorities with the necessary job skills. While standard treatment may be

theoretically appealing, in reality, small market stations experience vastly less favorable qualified minority and female hiring opportunities. As demonstrated above, the qualified female and minority applicant pool can be a dramatically lower percentage than the female and minority percentage of the civilian labor force at large.

13. The Curators hold the licenses for two broadcast stations in Rolla and two others in Columbia, Missouri. Rolla has a total population of 14,090, including approximately 4,826 college or university students. Columbia has 69,101 residents and approximately 22,166 of those residents are college or university students. While two of the University's noncommercial educational FM stations are located in the more populous areas of St. Louis and Kansas City, they must compete for job applicants with the many commercial stations. Recruiting a "pool" of qualified applicants for any position can itself be a demanding task. Recruiting a qualified pool of applicants that meets the Commission's unrealistic standards is a virtual impossibility. The detailed analyses performed by the Curators for compliance with the OFCCP guidelines provide a more reasonable baseline from which to assess its recruitment efforts.

III. THE COMMISSION GUIDELINES SHOULD BE APPLIED PROSPECTIVELY

14. As part of its EEO policy, the Commission recently issued an EEO Policy Statement which established guidelines for assessing forfeitures for violations of the Commission's broadcast EEO Rule, including circumstances which merit an upward

or downward adjustment in the amount of the forfeiture. EEO Policy Statement, 9 FCC Rcd 929 (February 1, 1994). The Curators note that the guidelines and EEO Policy Statement should be applied prospectively only. The Supreme Court supports the view that statutes affecting substantive rights should not be applied retroactively absent the express intention of Congress. See Landgraf v. USI Film Products, No. 92-575 (April 26, 1994); see also Rivers v. Roadway Express, Inc., No. 92-938 (April 26, 1994). These cases, interpreting the obligations of an employer sued by an employee for sexual harassment which occurred prior to the time that the Civil Rights Act of 1991 created additional remedies, established that "it would be unjust to apply this kind of additional and unforeseeable obligation to conduct [of the employer] occurring before the effective date of the Act." Landgraf v. USI Film Products, 968 F.2d 427, 432-33, aff'd., No. 92-757 (April 26, 1994). In the absence of express language to the contrary, "our traditional presumption teaches that [retroactivity] does not govern absent clear congressional intent favoring such a result." Landgraf, slip. op. at 36. To the extent that the new Commission guidelines will apply to public institutions, these institutions should not be penalized for noncompliance with the guidelines for any time period prior to February 1, 1994.

IV. CONCLUSION

For the foregoing reasons, the Curators of the University of Missouri believe that the Commission's EEO Rule and EEO Policy Statement create impossible burdens for small market stations. The current method of producing adequate pools for job hires is not realistic in smaller markets with the economic constraints of the profession and the competitive constraints of the marketplace. The OFCCP guidelines should be adopted by the Commission, at least for smaller markets, because they provide a much more accurate depiction of the qualified female and minority applicants in a metropolitan area.

Respectfully submitted,
THE CURATORS OF THE
UNIVERSITY OF MISSOURI

By: 

Dennis P. Cesari
Assistant Vice
President for Mgt.Serv.

STATEMENT OF KAREN TOUZEAU

1. I am the Assistant Vice Chancellor for Human Resource Services of the University of Missouri at Columbia, Missouri, a position that I have occupied for 5 years. My responsibilities include supervision of the Human Resource department including the Columbia campus's affirmative action programs as well as ensuring compliance with equal employment opportunity requirements. I also coordinate closely with my counterparts at the University's other campuses.

2. I am writing this Statement in support of the Comments that the Curators of the University of Missouri are filing in their capacity as the licensee of a commercial television station as well as noncommercial educational FM broadcast stations. During my tenure as Assistant Vice Chancellor for Human Resource Services, I have worked with the Columbia stations to assure that they collect the EEO data required by FCC rules and policies. I have found that the Commission's EEO and affirmative action requirements are far more burdensome than those already in force for public universities. As a result, we have had to adopt special measures to collect the data that the FCC expects licensees to supply with their license renewal applications.

3. I would like to take this occasion to examine the implications of the FCC's use of civilian labor force data for EEO compliance. I am particularly concerned about the impact of the FCC's procedures on small market stations where relatively few numbers of women and minorities are available for appropriate jobs.

4. The methodology for producing affirmative action programs for public universities is based on the regulations from the Office of Federal Contract Compliance (OFCCP). The OFCCP is responsible for enforcing the affirmative action requirements for those employers who are federal contractors. Because of its extensive contracts, the University of Missouri - Columbia is covered by these regulations.

5. It is my concern that the FCC uses different statistical standards than the OFCCP in determining deficiencies for the purposes of EEO and affirmative action. The use of civilian labor force statistics, in my judgment, is an incorrect data comparison. This is particularly true in light of the fact that most federal contractors are required to do a far more detailed analysis using numbers that represent the availability of women and minorities with the particular requisite skills for common jobs within a series of titles called a job family.

6. It is my understanding that according to the FCC, if a station meets the Commission's "parity test" for minority and female employment, it is generally considered in compliance with the EEO requirements. For instance, the 50% parity test means, "that the percentage of minority and female employees at the station considered separately, should be at least 50 percent of the percentage of minority and females in the labor force for the surrounding metropolitan statistical areas." In Boone County, Missouri, where Columbia is located, the civilian labor force data for women and minorities and resulting parity percentages are as shown in attached Table 1.

7. These figures include persons, both employed, unemployed and seeking work regardless of occupation. Thus, the figures do not identify the availability of persons in a particular metropolitan statistical area who have the skills to perform the jobs for which the University's TV station or radio station in Columbia has vacancies.

8. The FCC's new Policy Statement outlining EEO sanctions suggests a base fine of at least \$12,500 when a station fails to actively recruit so as to have minority and female applicants and interviewees for at least 66 percent of all the full-time openings. However, in small markets, meeting this female and minority applicant/interviewee pool may be an impossibility. This is particularly difficult when the actual availability of females and minorities in the reasonable recruiting work force is very small.

9. It seems that the FCC always determines "parity" by using the broad labor force number without regard for more accurate data. I believe it is important that the FCC consider the relevance of this civilian labor force data when so much of the enforcement effort is tied to this labor force number. I would suggest that the FCC use more precise census data to provide information on the specific availability of women and minorities with certain types of skills. Looking at the availability of persons with the appropriate requisite skills in the immediate labor area is a more relevant number to use for compliance purposes. This data is available for almost any jurisdiction in the nation and is also consistent with the kind

of analysis that the University is required to undertake when developing an entire affirmative action program.

10. Table 2 shows the percentage of women and minorities with the particular requisite skills in the same metropolitan statistical area using 1990 base census data for the 1992 census year. Factor 4 on Table 2 is the census data which specifically reflect the general availability of women and minorities with the requisite skills for specific EEO job groups in the local labor area (Boone County MSA). Please note that the figures representing "minorities with the requisite skills" in Factor 4 are less than the 9.8% civilian labor force figure, in every EEO job group except cleaning and food service. This suggests that the percentage of minorities and women actually available for employment might be less than the civilian labor force data. Therefore I would suggest that the FCC's parity standard should more appropriately be 50% of the availability for Factor 4 for each EEO job group in which broadcast stations have positions. The requirements imposed by the Commission should not be more stringent than those required by OFCCP.

I hereby declare that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 24th day of June 1994.



Karen Touzeau

TABLE 1
CIVILIAN LABOR FORCE BY RACE AND SEX,
BOONE COUNTY METROPOLITAN
STATISTICAL AREA 1980 AND 1990 CENSUS

YEAR	% FEMALE	% FEMALE PARITY	% MINORITY	% MINORITY PARITY
1980	49.29	24.64	10.83	5.42
1990	48.60	24.30	9.80	4.90

TABLE 2
AVAILABILITY OF WOMEN AND MINORITIES BY EEO JOB GROUP
1992

EEO JOB GROUP ¹	FACTOR ² 4 MIN	FACTOR ³ 5 MIN	AVAILABILITY ⁴ MIN	FACTOR 4 WOMEN	FACTOR 5 WOMEN	AVAILABILITY WOMEN
101 - MANAGER/ADMINISTRATOR	3.5	11.5	9.7	43.7	35.2	33.7
304 - ENGINEERS	6.4	13.4	10.5	19.1	17.8	24.8
308 - PUB RELATIONS/PUB WRTR	5.7	7.5	7.8	49.5	44.0	43.6
310 - WRTR/ART/ENTERTAINER	7.7	6.0	7.8	47.7	51.5	45.5
402 - CLERICAL/MISC	9.5	9.5	10.2	69.4	69.4	55.2
403 - CLERICAL-SEC/STENO/TYP	9.3	9.3	10.1	90.7	90.7	75.0
502 - WRTR/ART/ENTERTAINER	6.0	6.0	10.5	56.2	56.2	48.3
503 - OPER: COMP/PERIP EQUIP	7.5	7.5	9.0	41.0	41.0	39.6
504 - ENG/SCIENCE TECHNICIAN	8.8	10.5	10.5	29.8	25.8	30.6
704 - CLEANING AND FOOD SERVICE	18.5	18.5	12.0	45.7	45.7	28.6

¹ EEO Job Groups - consist of job titles grouped together to due common characteristics, similar content, wage rates and opportunities (41 CFR60-2.11(b)).

² FACTOR 4 - The general availability of women and minorities having requisite skills in the immediate labor area. Boone County SMSA

³ FACTOR 5 - The availability of women and minorities having requisite skills in an area in which the employer can reasonably recruit.

⁴ AVAILABILITY - The percentage of minorities or women who have the skills for entry into a specified job group - based on OFCCP 8 factor analysis.

CERTIFICATE OF SERVICE

I, Jackie Haskins, a secretary of the law firm, Fisher Wayland Cooper Leader & Zaragoza L.L.P. hereby certify that I have, this 13th day of June, 1994, caused to be sent by United States first class mail, postage prepaid, a true and correct copy of the foregoing "**COMMENTS OF THE CURATORS OF THE UNIVERSITY OF MISSOURI**" to the following:

*Roy Stewart, Esq.
Chief, Mass Media Bureau
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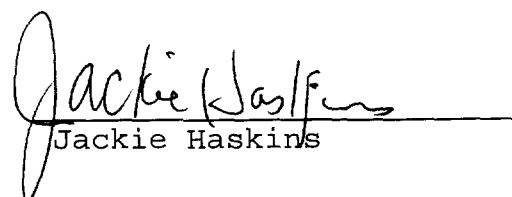
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Jackie Haskins

*By Hand Delivery